Of global cities and Gallic villages: tensions between constitutional and international law

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The judgment by the Italian Constitutional Court of 22 October 2014 is but a first climax in a series of recent incidents evidencing the strained relationship between international and domestic law. In the United Kingdom, the Tories are currently debating whether they ought to exit the system of the European Convention on Human Rights (ECHR). And in Switzerland, a new popular initiative entitled "Swiss Law supersedes foreign law" has been announced; in addition, a member of government has formally asked to withdraw from the ECHR.

Of course, these three cases differ on many accounts. In Italy, it was the Constitutional Court, which, as a court of law, declared a measure implementing an international judgment to be unconstitutional. In the United Kingdom and in Switzerland in turn, skepticism towards international law reveals itself in the political process. While the Italian judgment is directed against the International Court of Justice's assessment regarding state immunity, discussions in Switzerland and the United Kingdom are more focused on the binding decisions issued by the European Court of Human Rights, which are considered to contradict standards of democratic self-determination. In addition, these three examples do not stand alone. Discussions on the relationship between constitutional law and international law take place in various countries, sparked by varying incidents and under varying circumstances.

Despite all these differences, we believe it to be worthwhile considering these phenomena together. They all tell a story about the increasingly strained relationship between constitutional law and international law that merits closer examination. Of course, the relationship between domestic law and international law has always been a multifaceted and complex one. This complexity is in part due to international law's intricacies as an imperfect legal system dependent on states – and it is likely to increase as more and more issues that used to belong to the domaine réservé of states enter the international arena and as different levels of legal regulation become increasingly intertwined.

On the one hand, international or European law – such as the EU regulations regarding expulsions under the Dublin directives – can be found incompatible with national fundamental rights standards. On the other hand, national decisions are increasingly measured against international human rights standards, as evidenced e.g. by the discussion surrounding Switzerland's ban on minarets a few years ago. Switzerland and the United Kingdom invoke concerns regarding democratic legitimacy against unconditional judgments issued by international courts. In turn,

international fora assess whether states fall short of democratic standards (e.g. here and here).

Whether it is human rights, the rule of law or democracy – the same principles are often put forward as arguments in favor of precedence from both sides. It is the convergence of international norms and national constitutional principles that, in our view, contributes to the increased tensions between international and constitutional law. Human rights form a clear example: no less than nine international human rights treaties are complemented by a number of regional human rights instruments, and an increasing number of states has incorporated fundamental rights charters into their constitutions. But although the same rights might be concerned nominally, interpretation and balancing of these fundamental rights varies largely – and calls for constant renegotiation. We can discern similar processes with regard to other principles as well: the rule of law is not only being discussed in individual states and at the level of the European Union, but also within the United Nations. And even democracy is no longer considered to be limited to the nation state.

It becomes obvious how difficult a task it is to do justice to the complexity of the matter at hand and to include the necessary differentiations. Wholesale praise or rejection of one legal system or the other misses the target – international law, as much as national law, is neither intrinsically good nor bad. In some cases, the refusal by national institutions to comply with international law can be seen as defending fundamental constitutional principles such as democracy or human rights. On the other hand, such acts of rebellion might put into question the credibility and authority of international law, and thus endanger legal certainty.

In view of these increasing tensions between international and constitutional law that we have sketched out, we want to initiate a dialogue between international and constitutional law scholars. In which countries and in which constellations can we observe tensions between international legal rules and/or institutions on the one hand and the domestic law on the other? Do we see a number of individual cases that cannot be compared to each other, or can we discern a more general trend of skepticism towards international law? Are the European cases related to the financial crisis and/or to the rise of right-wing movements as seen during the latest European elections? Is the skepticism limited to decisions issued by international courts, such as the European Court of Human Rights (in the case of Switzerland or the UK) or the International Court of Justice (when it comes to Italy or the United States), or does it extend to international law in general?

In this symposium, we want to look at individual countries where tensions between constitutional and international law have become visible recently. In the first place, it is thus the objective to gain a better understanding of these cases and their specific circumstances. At the same time, we call on reading those phenomena together in order to tackle more general questions. We ask for instance at which point a state's readiness to violate international obligations might constitute a threat to its own domestic rule of law standard – and which possibilities international law has to react to such situations.

Astrid Epiney will take a closer look at the current political and legal debate in Switzerland. The Vice-President of the European Court of Justice, Koen Lenaerts, talks about the ECJ's role and European constitutional principles vis-à-vis the international legal order. Felix Würkert comments on Filippo Fontanelli, who discussed the Italian constitutional court decision a few weeks back; Filippo will reply to Felix and sketch out some more general arguments. Robert Frau examines the German discussions, whilst Jannika Jahn provides us with an insight on the United Kingdom. Nico Krisch analyzes why these tensions appear in the first place and where to root them normatively. Of course, we do not want to stop the conversation there but look forward to critical comments on individual posts as well as further submissions to our symposium. If you would like to contribute a post, please contact us at ajv.kontakt@gmail.com or symposium@verfassungsblog.de.

All contributions to this symposium are also published on Völkerrechtsblog.
